DISTRIBUTED
OCT 28 1999

ORIGINAL

Supreme Court, U.S.
FILED
OCT 28 1999
CLERK

No 98-9537

In the

Supreme Court of the United States

JUATASSA SIMS,

Petitioner,

vs

KENNETH S. APFEL,
Commissioner of Social Security,

Respondent

RECEIVED
OCT 28 1999
OFFICE OF THE CLERK
SUPREME COURT, U.S.

On Petition for a Writ of Certiorari

To the United States Court of Appeals

For the Fifth Circuit

REPLY TO BRIEF FOR THE RESPONDENT IN OPPOSITION

Sarah H Bohr
Counsel of Record for Petitioner
Sarah H Bohr, P A
2337 Seminole Road
Atlantic Beach, Florida 32233
Telephone (904) 246-7603

Chantal J Harrington
4859 Mariner Point Drive
Jacksonville, Florida 32225
Telephone (904) 997-9272
Florida Bar No 0817767

Gary R Parvin
Route 2, Box 149C
Coffeeville, Mississippi 38922
Telephone (601) 626-6648
Mississippi Bar No 4034

31 pp

TABLE OF CONTENTS

INDEX OF AUTHORITIES ii

ARGUMENT 2

I THERE IS A CLEAR SPLIT OF AUTHORITY AMONG THE FEDERAL CIRCUIT COURTS OF APPEAL REGARDING WHETHER CLAIMANTS SHOULD BE REQUIRED TO SPECIFICALLY RAISE ALL ISSUES TO THE APPEALS COUNCIL TO PRESERVE SUCH ISSUES FOR APPEAL IN FEDERAL COURTS 2

II BECAUSE OF THIS CLEAR SPLIT IN AUTHORITY, CLAIMANTS ARE NOT UNIFORMLY TREATED AMONG THE TWELVE JUDICIAL CIRCUITS, RESULTING IN THE INCONSISTENT AND UNEQUAL ADMINISTRATION OF A NATIONAL PROGRAM 6

III THE COMMISSIONER'S UNOFFICIAL PROPOSED MODIFICATION TO THE APPEALS COUNCIL REQUEST FOR REVIEW FORM AND THE ALLEGED UPCOMING ABOLITION OF THE APPEALS COUNCIL WILL NOT ADEQUATELY RESOLVE THE ISSUES PRESENTED HEREIN 11

CONCLUSION 18

INDEX OF AUTHORITIES

Fernandez v. Apfel, No 97 Civ 6936, 1998 WL 603151 (S D N Y Sept 11, 1998) 12

Harper v. Secretary of Health and Human Servs., 978 F 2d 260 (6th Cir 1992) 4

Harwood v. Apfel, 186 F 3d 1039 (8th Cir 1999) 2, 4-6, 8, 12

James v. Chater, 96 F 3d 1341 (10th Cir 1996) 4

Johnson v. Apfel, __ F 3d __, 1999 WL 675368 (7th Cir Aug 30, 1999, *amended* Sept 30, 1999) 2, 4-6, 8, 12, 13

Kelley v. Apfel, 185 F 3d 1211 (11th Cir 1999) 5

Krafsur v. Secretary of Health and Human Services, 757 F 2d 446 (1st Cir 1985) 3

Krysztoforski v. Chater, 55 F 3d 857 (3d Cir 1995) 3

Lopez v. Shalala, No 94-50139 (5th Cir Dec 22, 1994) 8

Meanel v. Apfel, 172 F 3d 1111 (9th Cir 1999) 4

Mullane v. Central Hanover Bank & Trust Co., 339 U S 306 (1950) 17

Paul v. Shalala, 29 F 3d 208 (5th Cir 1994) 8

Richardson v. Perales, 402 U S 389 (1971) 16

Sayre v. Chater, 113 F 3d 1232 (Table), No 95-3080, 1997 WL 232305 (4th Cir May 8, 1997) 3

REGULATIONS

20 C F R §404 1707 ..... 11, 14

20 C F R § 404 975 15

20 C F R § 404 976 15

20 C F R §404 900 ..... 15, 17

20 C F R §410 684 ..... 11, 14

20 C F R §416 1507 ..... 11, 14

OTHER

Jon C Dubin, *Torquemada Meets Kafka: The Misapplication of the Issue Exhaustion Doctrine to Inquisatorial Administrative Proceedings*, 97 Colum L Rev 1289 (1997) 8, 10, 12, 13, 17

POMS § GN 03910 040(B) 14

POMS § GN 03910 090 14

REPLY TO BRIEF FOR THE RESPONDENT IN OPPOSITION

Petitioner, JUATASSA SIMS (hereinafter "Sims"), hereby replies to the Brief for the Respondent in Opposition filed by the Commissioner of Social Security (hereinafter "Commissioner's Brief") Sims specifically responds to the Commissioner's Brief as follows (1) there is a clear split of authority among the federal circuit courts of appeal regarding whether claimants should be required to specifically raise all issues to the Appeals Council to preserve such issues for appeal in federal courts, (2) because of this clear split in authority, claimants are not uniformly treated among the twelve judicial circuits, resulting in the inconsistent and unequal administration of a national benefit program, and (3) the Commissioner's unofficial proposed modification to the Appeals Council Request for Review form and the alleged upcoming changes to the administrative appeals structure will not adequately resolve the issues presented herein

The question presented by Sims in her Petition for a *Writ of Certiorari* is ripe and is appropriate for consideration by this Court at this time Delay will serve no purpose and will only result in more inequality in the administration of a national benefit program that heretofore has been regarded as a non-adversarial informal system Sims respectfully urges this Court to issue a *writ of certiorari* and to resolve the clear inconsistency among the federal circuits on whether issue exhaustion is required during the pendency of Appeals Council review [1]

---

[1]On a preliminary note, the Commissioner's Brief incorrectly states that the district court addressed and rejected several arguments that Sims failed to present to the ALJ Commissioner's Brief at 3 While the Commissioner is correct that the district court addressed the issues presented on the merits, the Commissioner is incorrect in so far as he implies that the district court made any statement as to issue exhaustion In fact, in its decision, the district court did not even address issue exhaustion or hold that Sims waived her rights to raise issues before the district court *See* Appendix to Sims Petition for a Writ of Certiorari (hereinafter "Appendix" at 15-33 The Commissioner failed to object to the Magistrate Judge's Report & Recommendation that simply addressed the issues on the merits or file a notice of cross appeal with the Fifth Circuit Despite this fact, the Fifth Circuit held that it had no jurisdiction to consider two of Sims' three arguments *Id* at 1-2

ARGUMENT

I. THERE IS A CLEAR SPLIT OF AUTHORITY AMONG THE FEDERAL CIRCUIT COURTS OF APPEAL REGARDING WHETHER CLAIMANTS SHOULD BE REQUIRED TO SPECIFICALLY RAISE ALL ISSUES TO THE APPEALS COUNCIL TO PRESERVE SUCH ISSUES FOR APPEAL IN FEDERAL COURTS.

As argued in Sims' Supplemental Brief in Support of Petition for a *Writ of Certiorari* (hereinafter "Supplemental Brief"), there is a clear split of authority among the federal circuits regarding whether issue exhaustion principles apply to bar claimants from raising issues in federal court that they did specifically raise before the Appeals Council. *See* Supplemental Brief at 2-3. In his brief, the Commissioner even acknowledges this split in authority among the federal circuit courts of appeal on whether issue exhaustion requirements apply at the Appeals Council level as a prerequisite to raising issues before the federal courts. See Commissioner's Brief at 10. Significantly, the Commissioner also essentially ***concedes*** that the Fifth Circuit's decision in *Sims* is erroneous. *Id.* at 5, n.3. Specifically, the Commissioner admits that the Fifth Circuit's absolute position in *Sims* that it is jurisdictionally barred from considering issues not raised before the Appeals Council is incorrect, arguing instead that the doctrine is "one of judicial practice." *Id.*

As noted in the Supplemental Authority filed in this case, based on the recent decisions of *Harwood v. Apfel*, 186 F.3d 1039 (8th Cir. 1999) and *Johnson v. Apfel*, 1999 WL 675368, __ F.3d __ (7th Cir. Aug. 30, 1999, *amended* Sept. 30, 1999),[2] there is now a clear conflict between the Fifth Circuit and the Seventh and Eighth Circuits regarding the issues presented in this case. In *Sims*, the

---

[2]On September 30, 1999, the Seventh Circuit amended its initial decision in *Johnson v. Apfel*, *supra* as follows:

> the first two lines on page four ("the Council spends no more than 10 minutes per appeal, on average, Dubin, *supra*, 97 Colum. L. Rev. at 1326 n. 181") is (sic) changed to read "it should take only 10 minutes to fill out the form. 58 Fed. Reg. 28596 (May 14, 1992)."

Fifth Circuit held that it did not have ***jurisdiction*** to consider Sims' arguments because she had not raised them administratively before the Appeals Council. *See* Appendix at 1-2. On the other hand, the Seventh and Eighth Circuits *completely reject* the application of issue exhaustion at the Appeals Council level of administrative appeal in a *jurisdictional* or a *judicial practice* sense. Other circuits seem to apply the doctrine as a matter of perceived judicial discretion, without any discussion of whether issue exhaustion is appropriate in the informal, nonadversarial context of Social Security appeals. For the convenience of this Court, the following chart outlines the clear conflict between the circuits regarding whether and how issue exhaustion even applies in the Appeals Council context:

Jurisdiction	Circuit Court Case Citations	Issue Exhaustion Required?	Holding
First Circuit	No Decision[3]		
Second Circuit	No Decision		
Third Circuit	No Decision[4]		
Fourth Circuit	No Published Decision Unpublished Decision - *Sayre v. Chater*, 113 F.3d 1232 (Table), No. 95-3080, 1997 WL 232305, at *2 (4th Cir. May 8, 1997)	Yes	The Fourth Circuit reasoned that it was inappropriate for courts reviewing appeals of agency decisions to consider arguments not raised before the administrative agency involved

---

[3]The First Circuit case cited by the Commissioner in his brief, *Krafsur v. Secretary of Health and Human Services*, 757 F.2d 446, 447 (1st Cir. 1985), does not specify whether the claimant was barred from raising an issue before the circuit court due to the failure of the claimant to raise the issue before the district court versus the Appeals Council. *See* Commissioner's Brief at 10.

[4]The Third Circuit case cited by the Commissioner in his brief of *Krysztoforski v. Chater*, 55 F.3d 857, 860 (3d Cir. 1995) also is unclear whether the Third Circuit held that an issue must be raised before either the ALJ or the district court, or both the ALJ and the district court for the issue to be preserved for consideration by the circuit court. *See* Commissioner's Brief at 10.

Jurisdiction	Circuit Court Case Citations	Issue Exhaustion Required?	Holding
Fifth Circuit	*Sims v. Apfel* (the case before this Court)	Yes	The Fifth Circuit held that it did not have jurisdiction to consider issues not raised to the Appeals Council
Sixth Circuit	*Harper v. Secretary of Health and Human Servs.*, 978 F 2d 260, 265 (6th Cir 1992)	Yes	The Sixth Circuit held that because the record did not indicate that the claimant raised an issue administratively, "[it was] not in a position to consider the issue "
Seventh Circuit	*Johnson v. Apfel*, No 98-4284, __ F 3d __ (7th Cir Aug 30, 1999, *amended* Sept 30, 1999)	No	The Seventh Circuit (J Posner) overruled prior decisions that held that issue exhaustion was required Chief Judge Posner analyzed the Social Security appeal process and relied upon the lack of any regulatory support, the lack of enforcement by the agency of issue exhaustion, and the lack of notice to claimants
Eighth Circuit	*Harwood v. Apfel*, __ F 3d __, 1999 WL 608649 (8th Cir Aug 13, 1999)	No	The Eighth Circuit refused to apply issue exhaustion principles after a careful analysis of the Social Security benefit process
Ninth Circuit	*Meanel v. Apfel*, 172 F 3d 1111, 1115 (9th Cir 1999)	Yes	The Ninth Circuit upheld issue exhaustion principles, finding that issue exhaustion applies to claimants absent a manifest injustice
Tenth Circuit	*James v. Chater*, 96 F 3d 1341 (10th Cir 1996)	Yes	The Tenth Circuit held that issue exhaustion principles applied on a prospective basis only, after publication of the *James* decision

Jurisdiction	Circuit Court Case Citations	Issue Exhaustion Required?	Holding
Eleventh Circuit	*Kelley v. Apfel*, 185 F 3d 1211 (11th Cir 1999)	Yes	The Eleventh Circuit refused to consider the claimant's third argument because the claimant did not raise the argument before the administrative agency or the district court
D C Circuit	No Decision		

The foregoing table illustrates the division among the circuits on whether and how issue exhaustion should apply to claimants who appeal to the Appeals Council as a prerequisite to arguing the same issues in federal court The Fifth Circuit maintains the most extreme position of all the circuits which have applied the issue exhaustion doctrine to bar claims In *Sims*, the Fifth Circuit held that it did not have jurisdiction to consider Sims' arguments Appendix at 1-2 The other circuits upholding issue exhaustion either are not clear on whether it is a jurisdictional requirement or simply apply the doctrine without much analysis

The Seventh and Eighth Circuits have had the benefit of all of these decisions and have rejected the application of issue exhaustion principles in Social Security cases *See Johnson*, 1999 WL 706635 at *2, *Harwood*, 186 F 3d at 1042 The Seventh Circuit even overruled its prior cases and held that issue exhaustion did not apply *Johnson*, 1999 WL 706635 at *2 Chief Judge Posner carefully analyzed the lack of regulations, the lack of notice, and the lack of uniform enforcement by the Commissioner *Id.* After completing his analysis, he admitted that the doctrine had no application in the current regulatory environment, and even went so far as to ***overrule at least six prior published Seventh Circuit decisions*** holding or containing language to the contrary He stated that the prior Seventh Circuit decisions, as well as the Tenth Circuit and Fifth Circuit positions,

"***could not be squared with the regulations governing appeals to the Appeals Council***" *Id* (Emphasis added) Because the *Johnson* decision overrules prior decisions of the Seventh Circuit, Chief Judge Posner circulated the decision to the full court, as required by its local rules As stated in the decision, "*[n]o judge in regular active service asked that the case be heard en banc*" *Id*

In *Harwood*, the Eighth Circuit likewise refused to apply issue exhaustion principles to bar claimants from raising issues in federal court that were not specifically raised before the Appeals Council *Harwood*, 186 F 3d at 1042 The Eighth Circuit's opinion is similar in content to Judge Posner's Seventh Circuit opinion Both focus on the failure of the Commissioner to itself enforce the waiver, the nonadversarial nature of the Social Security benefit administration process, the lack of notice to claimants of such a requirement, and the lack of well-reasoned support in the case law or the regulations for imposing such a requirement *See Harwood*, 186 F 3d at 1042-1043, *Johnson*, 1999 WL 706635 at *2

The above summary of the circuit court law establishes that the issue exhaustion doctrine is a critical matter and is not being consistently applied throughout the federal circuits On this basis and for the reasons set forth in her Petition for a *Writ of Certiorari* and Supplemental Brief, and for the purpose of ensuring the uniform administration of the national Social Security benefit program, Sims respectfully requests that the Supreme Court grant her Petition for a *Writ of Certiorari*

II. BECAUSE OF THIS CLEAR SPLIT IN AUTHORITY, CLAIMANTS ARE NOT UNIFORMLY TREATED AMONG THE TWELVE JUDICIAL CIRCUITS, RESULTING IN THE INCONSISTENT AND UNEQUAL ADMINISTRATION OF A NATIONAL PROGRAM

The existence of a split in authority on this issue among the federal circuits guarantees that claimants will not be uniformly treated, even though they are all seeking benefits through the same national Social Security program Indeed, the Commissioner himself acknowledges that the Social Security Administration *does not always* raise issue exhaustion as a defense Commissioner's Brief

at 9 Evidently, the Commissioner has internal policies that would "ordinarily" protect unrepresented claimants from the application of the doctrine on a "significant frequency" *Id* Thus, the Commissioner admits that the doctrine is not even uniformly enforced by his own staff

The Commissioner tacitly concedes that issue exhaustion in the Social Security appeals context is not required by current regulations, and instead argues that it is a matter of *appropriate* judicial discretion Commissioner's Brief at 5, n 3 and 8 On the other hand, the Commissioner suggests that this Court should not even consider the issue because it is intending to modify various forms at the administrative level, thereby implying that the modifications will resolve all the concerns *Id* at 11-12 If the current state of affairs is acceptable and without deficiencies, then why is the Commissioner suggesting changes in the administrative procedures? It is apparent that the Commissioner realizes that the issue exhaustion doctrine is not uniformly applied around the country, and that the lack of uniform application is resulting in inequity in the administration of a national benefits program

The Commissioner's suggestion that the SSA's internal policies somehow ensure that the doctrine is not used against unrepresented claimants is faulty at best The Fifth Circuit believes that it is jurisdictionally barred from considering issues that were not raised on appeal to the Appeals Council *See* Appendix at 1-2 The hurdle that must be met to overcome a jurisdictional bar is significantly greater than one of judicial discretion The Fifth Circuit's position on issue exhaustion conflicts with all the other circuits which have considered the issue In theory, it is irrelevant whether the Commissioner's staff elects to raise the issue, since the federal courts have been instructed that they do not have jurisdiction to consider such issues, regardless of whether the government even raises issue exhaustion

An example of the harshness of the Fifth Circuit's policy was outlined by Professor Dubin

in the article cited extensively by both the Seventh and Eighth Circuits in *Johnson* and *Harwood*. *See Johnson* ,1999 WL 706635 at *2, *Harwood*, 186 F 3d at 1042-1043, *citing* Jon C Dubin, *Torquemada Meets Kafka: The Misapplication of the Issue Exhaustion Doctrine to Inquisatorial Administrative Proceedings*, 97 Colum L Rev 1289 at 1316-1317 (1997) (hereinafter "Dubin") As noted by Professor Dubin, in an early unpublished decision, *Lopez v. Shalala*, No 94-50139 (5th Cir Dec 22, 1994), "the Fifth Circuit signaled that it intends to apply issue exhaustion broadly to limit claimant's access to federal judicial review " *Id* at 1316 In *Lopez*, the claimant, represented by a legal aid paralegal before the Appeals Council, asserted in the three lines provided on SSA's approved appeal form, the following grounds "I am disabled and unable to work I also ask that you please consider by age (63), limited education (3rd grade in Mexico), inability to communicate in english (sic) & work history " *Id* at 1317

Represented by legal counsel for the first time on appeal, the claimant raised various constitutional and due process arguments regarding the failure of the agency to provide an independent Spanish-speaking interpreter at the hearing, its consideration and reliance on an interview's report in English neither signed by nor translated to the claimant, and the failure to develop the record on behalf of a non English-speaking claimant lacking representation by legal counsel However, the Fifth Circuit held that it lacked jurisdiction to consider these arguments because

> they had not been 'specifically presented' in the administrative proceedings as required under *Paul*.[6] The claimant's request for review that the Appeals Council "'consider' his 'inability to communicate in English'" was "too indefinite to confer jurisdiction for [the court] to address his current arguments concerning the ALJ's conduct of hearing " Finally, "representation by a paralegal rather than an attorney [was] not cause" for failing to present these constitutional and administrative law arguments to the agency

[6]*Paul v. Shalala*, 29 F 3d 208 (5th Cir 1994)

Id at 1317-1318 (citations omitted)

Significantly, recent figures released by the Office of Hearings and Appeals reveal that in 1998, only 69 1% of claimants were represented by attorneys at the hearing level.[6] Non-attorney representatives (such as social workers and legal aid staff members) were involved in 16 6% of the hearings Additionally, other individuals, including family members or friends, were present at 26 3% of all hearings

The Commissioner's internal policies (which evidently do not appear to have been reduced to writing for review since they were not attached to the Commissioner's Brief) do not specify whether different rules apply to non-attorney representatives It is unclear whether non-attorney representatives, including social workers, family members, and others, will be held to the same standard as attorneys If so, should they be, given their lack of legal training? Is requiring the same specificity in arguments tantamount to authorizing the practice of law without a license? Claimants will be forced to obtain attorneys at the Appeals Council level - hardly reminiscent of a non-adversarial informal process As Professor Dubin noted, Social Security claimants who are unable to obtain attorney representation or any representation, are at a distinct disadvantage in appealing denials

> When the cases are then pursued in court on appeal, important constitutional, statutory, and regulatory issues have often not been identified during the administrative proceedings Because claimants have neither identified nor raised these issues before the agency, their legal claims are thereby precluded from judicial consideration — in large part, as a result of the absence of law-school trained counsel during the administrative adjudication In addition, lawyers for benefit claimants are now dissuaded from accepting cases on appeal to federal court that were handled without legal counsel at the administrative level because of their awareness that new arguments raised in court may be procedurally barred

[6]These statistics were obtained from a Freedom of Information Act request, and are data from the 1998 Office of Hearing and Appeals Case Control System

Dubin, 97 Colum L Rev 1289 at 1294-1295

Moreover, it appears that the internal guidelines only protect "unrepresented parties" *See* Commissioner's Brief at 9 Thus, the Commissioner's undocumented internal policies appear to require all representatives (non-attorney and attorney representatives) to raise each and every issue before the Appeals Council to protect their clients' rights to appeal This type of policy will undoubtedly have a chilling effect on representation of claimants by family members, social workers and others and will surely result in more claimants being unrepresented at the Appeals Council levels Many non-attorney representatives are performing a much-needed social service by assisting claimants, who might not otherwise be capable of appealing a decision by themselves, and who would not or could not locate an attorney to file an appeal before the Appeals Council

It is respectfully suggested that the same claimant with the same condition and at the same stage of appeal can have entirely different results depending on which circuit he resides If he resides in a circuit that follows a jurisdictional approach to issue exhaustion in the Social Security context, such as in Sims' Fifth Circuit, he may be forever barred from raising an issue, regardless of whether the Commissioner's undocumented internal policies indicate otherwise If he resides in the Seventh or Eighth Circuits, he will be permitted to raise his concerns, even if they were not raised administratively If he resides in the other circuits that have held that issue exhaustion applies, he will be precluded from raising issues in federal court that were not raised administratively, unless the pertinent court does not consider the issue and the Commissioner does not raise the issue If he resides in a circuit that has not yet made a decision on the issue, such as in the Second Circuit, one cannot even guess at the possible outcome It depends on if the Second Circuit follows the Fifth Circuit's view, the Seventh and Eighth Circuit's view, or the view of the other circuits which have decided in favor of issue exhaustion as a matter of judicial discretion

All these different possible outcomes cannot possibly be appropriate in the administration of a ***national benefits program*** that is otherwise ***heavily regulated by a well-defined regulatory process*** With the advent of the latest Seventh and Eighth Circuit decisions, the national benefit system will necessarily be inequitably administered among the federal circuits Sims respectfully urges this Court to grant her Petition for a *Writ of Certiorari* and resolve the split among the circuits that is, *as a matter of fact*, resulting in differing applications around the country of the same national program

III. THE COMMISSIONER'S UNOFFICIAL PROPOSED MODIFICATION TO THE APPEALS COUNCIL REQUEST FOR REVIEW FORM AND THE ALLEGED UPCOMING ABOLITION OF THE APPEALS COUNCIL WILL NOT ADEQUATELY RESOLVE THE ISSUES PRESENTED HEREIN

In his brief, although the Commissioner argues that the current system is adequate, the Commissioner states that he is considering several changes to ensure uniformity as to the issue before this Court Specifically, the Commissioner announces that the Social Security Administration (hereinafter "SSA") is considering amending the form that "claimants and their representatives must file with the SSA in order for the agency to recognize someone other than the claimant as acting on the claimant's behalf in matters before the agency" Commissioner's Brief at 11, *citing* 20 C F R §404 1707, §410 684, and §416 1507 The Commissioner also acknowledges that the issue presented to this Court may be conclusively resolved by regulation as he has also been informed that the SSA is considering the complete elimination of the Appeals Council in the administrative review process Commissioner's Brief at 13 Based on these two "new developments," the Commissioner argues that this case is not "ripe" for review The Commissioner's proposed modifications do not address the issues raised by this case

First, apart from due process and notice issues, the Commissioner has not pointed to any meaningful rationales for the discretionary application of judicially created issue exhaustion doctrine

in the context of Social Security benefit administration The Commissioner's only precedential support comes from reference to an unpublished United States Magistrate Judge's opinion from the Southern District of New York which suggests, without discussion of the Appeals Council's operating reality, that agency autonomy and expertise, efficient judicial review, and judicial economy are promoted by Appeals Council issue exhaustion Commissioner's Brief at 5 *citing Fernandez v. Apfel*, No 97 Civ 6936, 1998 WL 603151 at *16 (S D N Y Sept 11, 1998) However, the only two circuit courts to analyze the actual operating reality of the Appeals Council have held that issue exhaustion should not apply in the Social Security context as it is inconsistent with the present functioning of the appeals process for such claims *Johnson*, 1999 WL 706635 at *2 ; *Harwood*, 186 F 3d at 1042-1043

In view of the true operating reality of the Appeals Council, issue exhaustion serves no meaningful or legitimate prudential function As explained by Professor Dubin, as of the date of his article (June 1997), the Appeals Council processes over 78,000 cases a year Dubin, 97 Colum L Rev 1289 at 1326 Because of the demands on each Appeals Council member, a typical case receives less than fifteen minutes of paper time The Appeals Council almost never operates as a panel or conducts oral argument *Id.* Most decisions contain boilerplate language and only five percent of the cases reviewed produce changes in results *Id* at 1326-1327

Critically, the Commissioner has not argued that the Appeals Council serves any legitimate role in the appeals process Indeed, the Commissioner admits that the SSA has been considering abolishing the Appeals Council since the mid-1990's Commissioner's Brief at 13 In fact, the Commissioner has been "studying" abolishing the Appeals Council for over ten years As noted by Professor Dubin

> Not surprisingly, a comprehensive study in 1987 of the Appeals Council's operations, commissioned by the Administrative Conference of the United States, and conducted

> by Professors Charles Kock and Davis Koplow, concluded that '[t]he Appeals Council, as it now stands ... is buried in casefiles and unable to marshal its unique expertise or perspective ' Indeed, Professors Koch and Koplow were so impressed by the level of dysfunction at the Appeals Council that they gave serious consideration to its immediate abolition They ultimately recommended the Council's eventual abolition in the absence of successful and fundamental changes in its functioning

Dubin, 97 Colum L Rev 1289 at 1327-1328 (footnotes omitted)

Obviously, the Appeals Council is not serving the desired or anticipated role as originally hoped Under such circumstances, it seems patently unfair to require exhaustion of remedies at the Appeals Council level, when the Appeals Council heretofore has been considered by claimants' representatives throughout the country as nothing but a "weigh station" to federal court

As eloquently stated by Chief Judge Posner in *Johnson*

> The Appeals Council operates more like a complaint bureau than an appellate court, the ***Social Security Administration estimates that it should take only 10 minutes to fill out the form*** 58 Fed Reg 28596 (May 14, 1993)

Johnson, 1999 WL 706635 at *2 (Emphasis added) To prepare an extensive legal brief outlining the various possible errors committed by the ALJ for the purpose of protecting one's rights in federal court clearly envisions more than 10 minutes of work - strongly supporting Chief Judge Posner's ultimate conclusion that the current regulatory state is *inconsistent* with the application of issue exhaustion principles in Social Security cases *See Johnson*, 1999 WL 706635 at *2 The Commissioner never expected or even desired that all issues be raised before the Appeals Council to preserve them in federal court To require such detail based on a judicially created doctrine where the underlying regulatory scheme is not designed to accommodate such a requirement is improper

The Commissioner suggests that modifications to the form that claimants and their representatives must file for the SSA to recognize someone other than the claimant as acting on the claimant's behalf will resolve the issues presented by the lack of notice *See* Commissioner's Brief

at 11, *citing* 20 C F R §404 1707, §410 684, and §416 1507 The Commissioner's analysis is faulty Most importantly, the Commissioner's referenced form *does not even have to be signed by attorneys* to be considered valid *See* 20 C F R §404 1707(b) (1999) (stating that "[a]n attorney does not have to sign a notice of appointment") Indeed, a representative also is not required to use the prescribed form but can file another equivalent written statement *See Program Operations Manual System* § GN 03910 040(B) and § GN 03910 090 (indicating that a notice of appointment can be the Appointment of Representative form or an "equivalent written statement").[7] In other words, the claimant's representative might never even see the "notice language" that the Commissioner alleges he is intending to add to the representative form From a practical perspective, this solution also will not be successful as many copies of the old forms will still be circulating without the required language

The only way to definitively require exhaustion is through regulatory changes which must be recognized by all - not by changes to an internal form sometimes used by some representatives Again, quite interestingly, the Commissioner does not attach copies of the proposed language or any concrete evidence that it is going to implement such a procedure in the first place It is respectfully suggested that changes to standard forms take a long time to implement in the federal government Many different departments must approve modifications such as that proposed by the Commissioner Even if the proposed solution did work, in the interim -- which would likely span a significant length of time -- the national benefits program would not be administered in an equitable or uniform fashion around the country

Furthermore, a mere change in a government form (which will *not* be subject to notice and

[7]The Program Operation Manual System ("POMS") sets forth the Commissioner's internal operating procedures

comment), without a corresponding change in the regulations governing Appeals Council review, will result in further inconsistency and confusion in this national benefit program Once this occurs, the many regulations governing the Appeals Council, including 20 C F R §§ 404 975, 404 976 and 404 900 (1999), will become totally inconsistent with the language on the new "form "[8] Certainly, such a major change in the rights and remedies of disability claimants, from an informal, nonadversarial appeal process, should be accomplished through regulation, with an opportunity for notice and comment, and not by a change in a government form

The Commissioner also argues that the SSA has been considering making changes to the Appeals Council and the administrative appeals process since 1994 Commissioner's Brief at 13 He notes that a study was finally commenced in April 1997 to evaluate the complete elimination of the Appeals Council In fact, it has been well over ten years since SSA first discussed eliminating the Appeals Council, and nothing has changed *See* pages 12-13, *supra*

As recently as last week, Kenneth S Apfel, the Commissioner of Social Security, did not even reference the elimination of the Appeals Council as an issue under consideration by SSA On October 21, 1999, Mr Apfel testified before the Committee on Ways and Means Subcommittees on Social Security and Human Resources regarding the progress that SSA is making to improve its administration of the disability programs[9] He specifically discussed several initiatives which are "designed to improve the disability adjudication progress at all levels of adjudication . . . . " Exhibit A at 2 While Mr Apfel referenced the "elimination of the reconsideration step from the current four-level adjudicative process," he made no reference whatsoever to any plans to eliminate the Appeals Council *Id* at 6-7 Instead, he focused his remarks regarding the Appeals Council to

[8]*See* Sims' Petition for a *Writ of Certiorari* at 10-11 for a discussion of these regulations

[9]A copy of this testimony is attached as Exhibit A

eliminate the "long wait before receiving a decision" from that body

> Later this year, SSA will release its plan to improve service in this area Elements of this plan will include using attorneys from SSA's Office of the General Counsel to assist with case reviews, permitting claimants with cases pending at the Appeals Council to pursue new claims for periods of time subsequent to the ALJ decisions, and promoting stability and excellence on the Appeals Council by continuing SSA's efforts to obtain legislation that would provide pay parity for SSA's Appeals Council Administrative Appeals Judges with non-supervisory ALJs

Id. at 7

A plan which encompasses raising the salaries of the Administrative Appeals Judges is hardly consistent with a purported plan to eliminate that appeal step altogether Thus, the issues raised by Sims' Petition are not moot and are very relevant to the uniform administration of the national Social Security program

To ask the Court to defer certiorari so that the Commissioner can continue to consider doing something it has been thinking about doing for over ten years that may never actually happen makes no sense The Commissioner's solutions are vague and are nowhere near implementation The Commissioner has yet to publish proposed regulations to eliminate the Appeals Council and, as indicated by the Commissioner himself, abolishing the Appeals Council is not a priority at this time Notably, the proposal is not significant enough to be included as one of the agenda items by the Commissioner himself in discussing various initiatives designed to improve the administration of the national Social Security disability program

As previously stated by this Court, Social Security's administrative procedures should be "understandable to the layman claimant" rather than "comfortable only for the trained attorney," and should be "liberal and not strict in tone and operation" *Richardson v. Perales*, 402 U.S. 389, 400-01 (1971) The imposition of issue exhaustion principles in the context of Social Security appeals simply does not make sense in light of the well-accepted informality of such proceedings The

Commissioner's regulations explicitly provide that the Appeals Council will conduct the review process in an informal, nonadversary manner 20 C F R § 404 900(b) (1999) A person is deemed to have completed the steps of administrative review by making a "request" of the Appeals Council and by receiving a final decision by the Appeals Council 20 C F R § 404 900(a) (1999) The standard "Request for Review" form contains three lines of space for claimants to articulate their issues and grounds for appeal The foregoing procedures are inconsistent with the imposition of an issue exhaustion requirement It improperly sends conflicting and misleading signals to the claimants, many of whom have mental disabilities and/or limited educational abilities

In addition, Sims notes that even if the notice requirement was met by modifying the appeal form, due process also requires a meaningful opportunity to be heard *Mullane v. Central Hanover Bank & Trust Co.*, 339 U.S. 306, 314 (1950) At present, due to the informal proceedings during the pendency of a Social Security claim, a claimant has no real opportunity to raise, develop, and preserve issues at the hearing so they may be asserted on appeal to the Appeals Council Dubin, 97 Colum L. Rev. 1289 at 1336-1337. The claimant also has no ability to raise, assert and have these issues properly developed, heard and considered at the Appeals Council *Id* Were due process procedures to be enacted to accommodate issue exhaustion requirements, a significant change in the SSA's philosophy would be necessary

While there is no dispute that the imposition of an issue exhaustion requirement *could be legislated by the Congress and implemented by the SSA*, ***to date, this has not occurred***, and indeed, is inconsistent with the currently informal nonadversarial Social Security administrative appeal process The Fifth Circuit overstepped its boundaries when it decided to apply issue exhaustion principles to Sims' case Not only did it fail to consider Congressional intent and the plain statutory and regulatory language governing the administrative appeal of Social Security cases, but it also

substituted its own judgment for that of Congress and the SSA, as evidenced by the applicable legislation and regulations Sims respectfully requests that this Court grant her petition for a *writ of certiorari* to allow her the opportunity to fully brief the appropriateness of the issue exhaustion doctrine in the context of Social Security proceedings

CONCLUSION

The Commissioner has not argued, as he could not argue, that the issue exhaustion doctrine is equitably applied across the country As a result of the inequality of applying differing policies in a national benefit program, Sims respectfully prays that this Court issue a *writ of certiorari* to review the OPINION of the United States Court of Appeals for the Fifth Circuit

Respectfully submitted,

Sarah H Bohr
Counsel of Record for Petitioner
Sarah H Bohr, P A
2337 Seminole Road
Atlantic Beach, Florida 32233
Telephone (904) 246-7603
Facsimile (904) 246-8884

For Release on Delivery

DISABILITY OVERSIGHT

COMMITTEE ON WAYS AND MEANS
SUBCOMMITTEES ON
SOCIAL SECURITY AND HUMAN RESOURCES

October 21, 1999

STATEMENT BY
KENNETH S. APFEL

SOCIAL SECURITY ADMINISTRATION

EXHIBIT A

Chairman Shaw, Chairman Johnson, Mr. Matsui, Mr. Cardin and Members of the Subcommittees:

I am pleased to be here today to discuss the progress that SSA is making to improve its administration of the disability programs. This opportunity to report on SSA's disability programs is especially relevant since October has been designated by the Congress and the President as "National Disability Employment Awareness Month."

Overall, I am happy to report that SSA has made substantial progress towards improving the service it provides to individuals with disabilities. SSA is pleased with its progress in this direction, but recognizes that more needs to be done to ensure that these vitally important programs offer the protection that they were intended to provide to the American people.

While much of the public debate about Social Security focuses on retirement, this is also a particularly appropriate time to emphasize that about one third of Social Security beneficiaries are severely disabled workers, their children, or the surviving family members of workers who have died. Because about 25 to 30 percent of today's 20 year olds are estimated to become disabled before retirement, the protection provided by the Social Security Disability Insurance (SSDI) program is extremely important, especially for young families. For a young, married, average income worker with two children, Social Security is the equivalent of a $233,000 disability income insurance policy. In the event of severe disability, the SSDI program stands between these families and poverty. Additionally, the Supplemental Security Income Program (SSI) serves the most economically vulnerable population with disabilities, most of whom are living in poverty.

In December 1990, 5.7 million individuals with disabilities were receiving either Social Security or SSI disability benefits. As of December 1998, 9.0 million were receiving Social Security or SSI disability benefits. As you are no doubt aware, managing such an enormous complex program presents many challenges. One way to put our disability programs in perspective is to compare them with the recent experience in other developed countries.

Comparisons aren't always simple. SSA's programs have always awarded benefits on the basis of a single strict standard of disability defined by statute. Other nations have sometimes used broader standards to make it easier for persons nearing retirement or experiencing long-term unemployment to collect disability benefits. In addition, benefits are often provided to working-age adults without any disability requirement. In tandem with these broader standards, several countries have made quite strenuous efforts to encourage hiring the disabled and enabling them to go to work.

In spite of the considerable program growth of the early 1990's, SSA's disability rolls are not high in most comparisons to other western countries. For example, in the United States, at the end of 1998, 3.5% of the population insured under Social Security were receiving disability benefits from the SSDI program. This is slightly lower than rates in Germany, the United Kingdom, and Austria, and much lower than in the Netherlands, Sweden, or Norway.

Actuarial forecasts indicate that the number of people on SSA's disability rolls will continue to grow. The rate of disability prevalence is projected to increase from 3.5 % to almost 5% over the next 10 years. Although still a very small percent of the population, this represents an increase of almost 40 percent. This increase will occur largely due to the aging of the population and within the context of our very strict definition of disability.

The current growth in the disability programs has resulted in organizational stress as SSA's dedicated and capable employees have worked to maintain their traditional high level of customer service. Additionally, the resultant workload has made it even more critical that we seek ways to ensure that eligible individuals are identified as early in the process as possible.

In 1994, SSA announced an ambitious plan to streamline the disability process by eliminating unnecessary handoffs and most importantly to ensure that eligible individuals are identified as early in the process as possible. In the years following, SSA carefully tested many aspects of this plan. This testing was critical in order to make certain that our most vulnerable customers were not adversely affected by any changes.

In August 1998, the Social Security Advisory Board issued its report, "How SSA's Disability Programs Can Be Improved." In this report, the Advisory Board made a number of recommendations relating to SSA's disability programs. These recommendations included making the disability determination process more consistent and equitable, strengthening the public's trust in the integrity of the programs, and helping disabled individuals continue or return to work. As a result of SSA's prior initiative to strengthen the disability programs, SSA was already well on the way to addressing these concerns.

Disability Management Plan

SSA is now working on several initiatives designed to improve the disability adjudication process at all levels of adjudication, safeguard the integrity of the program, and enhance beneficiaries' opportunities to work.

Many of these initiatives are based on SSA's Disability Redesign Plan. After a lengthy study of the issues involved, I determined that no single initiative would be the answer. SSA needed to take concerted action in several areas. SSA needed to address longstanding issues to improve administrative efficiency and achieve greater consistency in our decisionmaking process.

In March of this year, SSA published the report, *Social Security and Supplemental Security Income Disability Programs: Managing for Today, Planning for Tomorrow*, and in August of this year, SSA published the report, *The Hearings Process Improvement Initiative: Delivering Better Service for the 21st Century*. These reports set out our comprehensive strategy and firm commitment to administer the disability programs fairly, effectively, and efficiently, so that SSA can continue to protect the millions of individuals who depend on it. To achieve this, SSA is making

improvements to both the initial disability determination process and the hearing process. The improvements are premised on SSA's strong belief that, through investments in the quality of our decisionmaking at the initial level of the administrative process, such as making the claim development process more comprehensive, SSA can expect to provide better service by ensuring that eligible individuals with disabilities are identified as early in the process as possible. Denied claimants who appeal will experience a more efficient appeals process that will take less time to produce decisions.

SSA recognizes that many of the benefits expected from these improvements will not materialize immediately. While SSA expects some short term decreases in productivity during implementation, the long term improvements to the system will outweigh these costs.

BACKGROUND

Before I get into specifics, a brief overview of the current disability process might help put this statement in context. The Social Security Act broadly defines disability as the inability to engage in any substantial gainful activity due to a physical or mental impairment expected to last at least one year or result in death. The Act requires the Commissioner of Social Security to prescribe rules for obtaining and evaluating evidence and making disability decisions. The law further requires that initial disability determinations be made by State Disability Determination Services (DDSs) following Federal rules and guidelines and financed by Federal funds.

State DDS Process

In the State DDS, a team composed of a disability examiner and a physician (or sometimes a psychologist) makes the disability determination based on an evidentiary record. The State DDS requests medical evidence from the treating physician(s) and other sources identified by the claimant. If that evidence is incomplete or conflicting, the disability examiner may request a consultative examination from the claimant's treating physician or a physician under contract to the DDS to perform these examinations. If necessary, the examiner will also obtain evidence from the claimant's family, friends, or other third parties that will help explain how the individual's impairment(s) affects his or her ability to work. The team then considers all medical and other evidence to make the disability determination.

Appeals Process

A person who is dissatisfied with an initial determination, may pursue an appeal through three administrative levels and the Federal courts. The Act requires the Commissioner to provide a claimant the opportunity for a hearing, and allows for filing of a civil action in Federal court after the Commissioner's final decision. SSA's regulations also provide a reconsideration review prior to the hearing before the administrative law judge (ALJ) and an opportunity for final review by SSA's Appeals Council.

Reconsideration is the first administrative review for claimants and involves a *de novo*, or fresh, review of the claim (including any new evidence) by individuals who did not participate in the original determination. The reviewers consider all of the evidence and issue a reconsideration determination.

The second level of administrative appeal is a *de novo* hearing before an ALJ who can call on medical or vocational experts, if needed, to help evaluate the evidence. Usually the claimant obtains legal representation at this point. Frequently, new evidence is introduced by the claimant and his or her representative, often at the hearing itself. Claimants are allowed to appear before the ALJ and to call witnesses.

The final administrative appeal level is the Appeals Council which may grant, deny, or dismiss a request for review of the ALJ decision. It will grant review if the ALJ decision contains an error of law, is not supported by substantial evidence, involves a broad policy issue, or if there appears to be an abuse of discretion by the ALJ. After an Appeals Council action, if the claimant is still dissatisfied, the next step is filing a civil action in Federal court.

Improving the Disability Adjudication Process

Results from redesign testing showed that certain process changes resulted in:

- A higher percentage of individuals being allowed at the initial level;
- Enhanced quality of initial decisions;
- Earlier access to the hearing process for those who appeal their initial decision; and
- High claimant satisfaction.

In addition to the information already gathered, SSA remains committed to testing the Disability Claims Manager concept as an alternative approach to claims taking. The results of this testing will allow SSA to determine if the process can provide a more user-friendly, efficient and faster way to serve claimants filing for disability benefits.

On October 1st SSA implemented prototypes in 10 states, which combine these features of redesign with other initiatives to improve the adjudicative process at all levels. These prototypes consist of the following:

- Enhanced documentation and explanations of decisions at the initial claims level;
- Revised roles of the disability examiner and medical consultant in State DDS determinations;

- An opportunity for a conference between the claimant and the State DDS decisionmaker; and

- Elimination of the reconsideration step of the administrative appeals process.

In our recent travels, Dr. Daniels and I saw first hand the commitment that SSA and DDS employees have to making the new process work. One SSA Office of Hearings and Appeals (OHA) employee succinctly pointed out that better documented and rationalized DDS determinations would make OHA's job harder because the planned initiatives ensure that only the most complex cases will get to OHA. Additionally, the new mantra for the New York DDS units participating in the prototype testing is "No easy cases to OHA."

Claims at the Initial Level

SSA is committed to enhancing the quality of decisions by ensuring that SSA policies are applied in a consistent manner by all adjudicators and by improving the development and explanations of disability determinations.

SSA's redesign experience showed that by focusing more attention at the initial determination level, SSA could expect to improve quality and identify eligible individuals earlier in the process.

Revising the Roles of the Disability Examiner and Medical Consultant

The process being tested in the prototype states enhances the existing roles of the disability examiner/medical consultant team and is derived from previous redesign tests. It permits the DDS disability examiner to make the initial determination of disability without requiring the certification of a medical consultant on the disability forms. The medical consultants will act as true consultants and generally will only be asked to review the more complex cases in which expert medical guidance is needed. Medical consultant review will, as required by law, continue to be required for all SSI childhood claims and in denials in which the evidence indicates the existence of a mental impairment.

Providing a Claimant Conference

The purpose of the claimant conference is to provide the claimant with an increased opportunity to interact with the disability decisionmaker earlier in the process and to submit further information when evidence in the initial claim is insufficient to make a fully favorable determination. Before issuing a less than fully favorable determination at the initial level, the DDS decisionmaker will contact the claimant to discuss the case. This ensures that claimants can fully present their case and allows them to have a better understanding of how their cases were decided. This initiative serves SSA's goals of improving customer service by making the process more personal and allowing appropriate claims earlier in the process.

Thorough case development and explanation practices at the initial claims level are crucial to achieving accurate decisionmaking. SSA recognizes that assuring more complete development and improved explanations of how the determination was made will require more time to be initially spent on each individual case. However, enhanced claims documentation is essential to furthering the overarching goals of improving the quality of decisions and making the correct decision early in the process. This will ultimately save time for many beneficiaries who will, as a result of these enhancements, be awarded benefits earlier in the process.

Eliminating Reconsideration

Eliminating the reconsideration step from the current four-level adjudicative process addresses SSA's goal for a streamlined, more efficient process. The improvements to the initial determination process will afford the same benefits without an additional administrative step.

Improving the ALJ Hearing Process

During the past few years, SSA undertook a number of initiatives to address large hearing workloads that have produced real results. Initiatives such as the establishment of case screening units and specialized decision writing units, helped decrease average processing time at the hearing level from 386 days in 1997 to, under a preliminary analysis, 316 days at the close of FY 1999. Despite these improvements, SSA knew that it had to do better.

Therefore, SSA convened a high-level interdisciplinary team under the direction and guidance of the Regional Chief Administrative Law Judges. The team also worked with an outside contractor (Booz-Allen & Hamilton, Inc.). The team was charged with making recommendations that would build on the recent improvements in OHA quality and timeliness and further reduce processing times, increase productivity, and enhance the quality of service to the claimant. In August of this year, SSA published the team's recommendations in *The Hearings Process Improvement Initiative: Delivering Better Service for the 21st Century*. As stated in the report, it is our intent that, when fully implemented, the Hearings Process Improvement initiative (HPI) will reduce processing times. Average processing times for all hearing cases are projected to fall from an estimated 316 days in FY 1999 to 257 days by the end of FY 2000, and 193 days in FY 2002.

The improvements envisioned by HPI differ from the more traditional response of committing additional resources to the existing hearing process that SSA has taken over the last few years. Instead, the plan relies on process changes, including new administrative processes for local hearing offices to achieve dramatic improvements. On this point, I want to make clear that there are no plans to alter the organizational structure of the Office of the Chief ALJ.

Specific HPI initiatives include implementation of a "National Workflow Model" that combines pre-hearing activities, a standardized pre-hearing conference, and processing-time benchmarks for various tasks. These activities will increase the "front-end"

efficiency of our hearing process and get the cases to our administrative law judges sooner for decisionmaking.

With the plan set out in the report, the Social Security Administration continues its commitment to a customer-focused hearings process that is more timely and efficient while maintaining the claimant's right to a fair and impartial hearing. We will begin implementing this plan in January 2000 and expect to have the project fully implemented by March 2001.

Improving the Appeals Council Process

Having reached decisions on making improvements to the initial and hearing levels, SSA is now carefully looking into what can be done to eliminate the long wait before receiving a decision from SSA's Appeals Council. Later this year, SSA will release its plan to improve service in this area. Elements of this plan will include using attorneys from SSA's Office of the General Counsel to assist with case reviews, permitting claimants with cases pending at the Appeals Council to pursue new claims for periods of time subsequent to the ALJ decisions, and promoting stability and excellence on the Appeals Council by continuing SSA's efforts to obtain legislation that would provide pay parity for SSA's Appeals Council Administrative Appeals Judges with non-supervisory ALJs. Quite simply, forcing individuals to wait more than a year for an Appeals Council decision is unacceptable.

Safeguarding the Integrity of the Program

As I stated at the outset SSA is committed to ensuring that only those who are truly disabled continue to receive benefits. Thanks to additional funding from Congress, and particularly this committee, SSA is doing more continuing disability reviews (CDRs) than ever. In fiscal year 1998, SSA processed almost 1.4 million periodic CDRs, more than twice the number of CDRs processed in 1996. Based on the CDRs done in FY 1998, SSA estimates that 70,300 beneficiaries will have their benefits terminated after all appeals, resulting in savings of approximately $4.4 billion when you consider the savings to the OASDI, SSI, Medicare, and Medicaid programs for the ten-year period running from 1998 to 2007. And while the numbers for FY 1999 are still preliminary, our initial data indicates that we will exceed the number of CDRs that we processed in FY 1998 by at least 10 percent.

Importantly, SSA is meeting the goals set in our 7-plan that SSA has shared with you. As you may recall, this plan calls for approximately 9.3 million CDRs to be conducted during the 7-year period, FY 1996 through FY 2002. SSA is on schedule to meet our goal of being up-to-date on all Title II CDRs by 2000, and all Title XVI CDRs by 2002. With your continued support, SSA will stay on top of this important workload.

Enhancing Beneficiaries Opportunities To Work

Before I close, I applaud this committee's work on the return to work legislation and want to reiterate the Administration's longstanding commitment to encouraging individuals with disabilities to return to work. This year, SSA promulgated regulations

to increase the level of earnings at which SSA presumes that a non-blind individual is performing substantial gainful activity from $500 to $700. This is just one in a number of initiatives that will be taken to help individuals with disabilities enter the workforce.

SSA's emphasis on returning individuals with disabilities to work is starting to pay off. Since FY 1996, the number of beneficiaries for which SSA reimbursed state vocational rehabilitation agencies for successfully returning beneficiaries to work has almost doubled from 6,024 in 1996 to 11,124 in FY 1999. Also, our latest data show that there were approximately 16,650 working SSDI beneficiaries at the start of FY 1998 and 23,300 working SSI recipients as of June 1999. SSA will continue to do all that it can to help individuals with disabilities return to work.

In addition to the initiatives that SSA can undertake using its current statutory authority, the Administration looks forward to working with Congress to enact the Work Incentives Improvement Act. I understand that there are financing and health- and education-related policy issues that remain to be addressed.

This important legislation improves access to health care for the disabled, establishes a program that allows consumers their choice of private or public employment service providers, creates work incentive outreach programs, and reauthorizes SSA's demonstration authority to test new and innovative ways to return people to work.

CONCLUSION

Thank you for the opportunity to be here today. SSA is committed to making the Social Security disability programs both more responsive to its claimants and beneficiaries and more accountable to the nation's taxpayers. We will tirelessly continue in our efforts to make Social Security's disability programs the best that they can be. I would be happy to answer any questions.